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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

REPLY COMMENTS OF METROPOLITAN FIBER SYSTEMS, INC.

Metropolitan Fiber Systems, Inc. ("MFS"), by its undersigned counsel, hereby submits its comments in reply to certain of the initial comments filed in response to the Notice of Proposed Rulemaking (the *"NPRM"*) released in this docket on January 28, 1992 (FCC 92-35).

As demonstrated in MFS's initial comments, the Commission's current policy of forbearance from tariff regulation for non-dominant common carriers is both fully consistent with the Communications Act and represents sound public policy. None of the initial comments filed in this docket calls into question the validity of this conclusion.

In particular, because those parties that challenge the lawfulness of forbearance fail to address the Congressional ratification of the forbearance policy through passage of the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"),[1] their legal challenge to forbearance must fail. Moreover, the Commission should reject the attempts of certain local exchange carriers ("LECs")

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[1] *Cf. NPRM* at ¶ 7.

to interject into this proceeding wholly irrelevant deregulatory policy and pricing issues that are wholly outside the scope of the *NPRM*. Therefore this rulemaking proceeding should be terminated and the forbearance policy retained in its current form.

I. AT&T'S LEGAL CHALLENGE TO FORBEARANCE FAILS TO ADDRESS THE KEY ISSUES

AT&T's arguments (albeit more focused on other interexchange carriers than on competitive access providers, like MFS) are far more notable for what they omit than for what they address. The linchpin of AT&T's legal challenge[2] opposing continuing the Commission's forbearance policies is the U.S. Supreme Court's decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc.[3] Maislin, however, is not controlling with respect to the lawfulness of the Commission's forbearance policy, which is governed not by the Interstate Commerce Act but by the Communications Act of 1934. AT&T completely ignores the critical distinctions between the Interstate Commerce Act provisions at issue in Maislin and the provisions of the Communications Act,[4] the only statute relevant to this inquiry into the Commission's regulatory regime.[5] Moreover, AT&T fails even to acknowledge, much less to

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[2]The Comments of the NYNEX Telephone Companies ("NYNEX") and US West essentially duplicate those of AT&T with respect to this issue, raising no additional arguments.

[3]110 S.Ct. 2759 (1990).

[4]AT&T also ignores relevant sections of Section 203 itself. *See, e.g.*, Comments of Association for Local Telecommunications Services ("ALTS") at 3-4.

[5]*See, e.g.*, Comments of MFS at 11-13; Comments of CompTel at 14-19.

address the impact of, the passage of TOCSIA.[6] As shown in the initial comments of numerous parties,[7] however, Congress not only was acutely aware of the existence of the Commission's policy of forbearing from tariff regulation for non-dominant carriers, but also clearly ratified that established policy. Congress's ratification of forbearance is the only reasonable explanation for the specific informational tariff provisions of Section 226 and is entirely consistent with the legislative history of their enactment. Thus, the Commission must dismiss AT&T's challenge to the legality of the forbearance policy.

II. IMPERMISSIBILITY OF CONSIDERATION OF LOCAL DEREGULATORY POLICIES IN THIS PROCEEDING

In the *NPRM*, the Commission narrowly circumscribed this docket, limiting it to an inquiry intended "to address the lawfulness of [the Commission's] forbearance policy."[8] That policy is concerned only with tariff requirements as they pertain to non-dominant carriers. Aspects of the Commission's *Competitive Carrier* decisions other than the tariff filing requirement for non-dominant carriers are thus outside the purview of review in this docket. In particular, the Commission's authority to classify

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[6]This statute is to be codified at 47 U.S.C. § 226.

[7]*See, e.g.*, Comments of MCI at 41-43; Comments of MFS at 7-8; Comments of CompTel at 9-11; Comments of ALTS at 5; Comments of Williams Telecommunications Group, Inc. at 3-5.

[8]*NPRM* at ¶ 8. Significantly, the Commission's list of specific topics to be addressed by commenting parties did not include the extension of the forbearance policy to dominant carriers, particularly local exchange carriers. *Id.* at (a) - (d).

carriers is well-established,[9] and the classification system employed by the Commission is not presently before the Commission in this docket.

Nonetheless, a number of parties seek to misuse this proceeding as a vehicle for the airing of deregulatory and pricing flexibility policy arguments outside the scope of the *NPRM*. In particular, several LECs have attempted to transform this proceeding into one considering the irrelevant issue of regulatory reform regarding interstate access services. For example, completely ignoring the limited range of questions specifically propounded by the Commission to advise parties of the scope of the issues, Pacific Telesis Group ("PacTel") sweepingly, but incorrectly, asserts that the "question here is what regulatory *policy* for competitive markets" satisfies the Commission's Section 151 obligations.[10]

Contrary to PacTel's curious characterization of the scope of the proceeding, however, the proceeding is limited expressly to the issue of the lawfulness of the current forbearance policy, and to lawful alternatives that could be implemented if the current policy were found not to be lawful. Thus, there is no basis for considering the issues raised by PacTel or the recommendation of NYNEX that the Commission streamline the regulation of "competitive services" offered by LECs.[11] Moreover, given the lack of notice that such a topic would be under consideration

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[9]*See, e.g.*, Comments of MFS at 4, Comments of LCI International at 3-4; Comments of Local Area Telecommunications, Inc. at 3-4 n.3.

[10]Comments of PacTel at 1, *citing* 47 U.S.C. § 151 (the requirement that the Commission "make available ... to all people of the United States a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable prices") (emphasis added). PacTel's Comments do not challenge the lawfulness of forbearance.

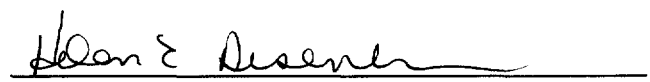
[11]Comments of the NYNEX Telephone Companies at 13-20.

here and thus of an ensuing opportunity to file timely and appropriate comments, such consideration of the inappropriate issues raised in the PacTel and NYNEX comments would violate the Commission's obligations under the Administrative Procedure Act to provide adequate notice of the subject matter of the rule making proceeding.[12]

CONCLUSION

For the foregoing reasons, the Commission should determine that its existing policy of forbearance with respect to tariffs for the domestic interstate services of non-dominant carriers is consistent with the Communications Act. It should therefore terminate this proceeding, and should give no consideration to extraneous issues raised by various participants in this proceeding.

Respectfully submitted,



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Dated: April 29, 1992

[12] 5 U.S.C. § 553(b).

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April 1992, copies of Comments of Metropolitan Fiber Systems, Inc. were served on the following:

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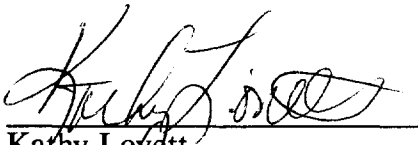

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